IN THE

# Supreme Court of the United States

October Term, 1956.

No. ~~915~~ 107

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually, *Appellants,*

*v.*

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, Also Known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person, *Appellees.*

## APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 918.

ELIZABETH DONNER HANSON, Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually,

*Appellants,*

*v.*

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, also known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an incompetent person,

*Apellees.*

## APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL.

While appellants believe that all of the points attempted to be made in Appellees' Motion to Dismiss are fully and adequately met in Appellants' Jurisdictional Statement, Appellants believe that by filing a reply they may be helpful to the Court in correcting the erroneous statements contained in the motion.

Appellees' motion admits and emphasizes the fact that if they are to pervail, it must be on the basis that "the

action filed by appellees in the trial court had as its *sole* purpose the determination of what property passed under the will of Mrs. Donner * * *." In the short space of five printed pages, they use the phrase "what passed under the Will" (with slight variation in some of the wording) a total of eight times. They insist that this theory of the case is supported, or at least recognized, not only by the trial and appellate courts of Florida, but also by the Supreme Court of the State of Delaware. The record does not support them.

(a) The Florida trial court in its order of April 9, 1954 (T. 51) found that the suit was "primarily concerned with the validity and effect of certain powers of appointment rather than the Will" and in its order of January 14, 1955 (23a) it made a direct ruling "that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment".

(b) The Florida appellate court had the temerity to admit the validity of the trust, saying: "We do not question the validity of the beneficial life estate reserved by the settlor" (9a). It then held that this valid trust was republished by Mrs. Donner after she had moved her residence from Pennsylvania to Florida by the exercise of the power of appointment dated December 3, 1949, and concluded that it "must consider the validity of the trust and the remainder interests it sought to create * * *" (10a). Having thus assumed jurisdiction, it proceeded to declare the trust invalid.

Appellants submit that the weakness of the early statement in the opinion of the Florida appellate court that "Jurisdiction existed by virtue of the Will * * *" (7a), is obvious in view of its later findings on the question of the validity of the trust. But the undeniable answer to appellees' position is that no action was needed to determine "what passed under the Will". Everything passed under its clear and unambiguous terms except property which had

been validly and legally disposed of in Mrs. Donner's lifetime.[1]

(c) It is true that the Supreme Court of the State of Delaware said:

> "In Florida the issue was, what assets passed under the Will of Mrs. Donner? The Florida ruling that the exercise of the power of appointment was testamentary was an implicit ruling of the invalidity of the 1935 agreement as an inter vivos trust, but it was only incidental to the main issue raised in the Florida proceeding." (39a)

That Court went on to say, however:—

> "This fact is sufficient answer to this assertion of the defense of *res adjudicata*, but it would seem clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit." (40a)

We submit that the grounds for appellees' motion to dismiss must fall once its "keystone", namely, "what passes under the Will" is removed.

**1. The Appeal Does Present Substantial Federal Questions.**

The Florida Courts, in their efforts to grasp jurisdiction under the provisions of Florida Statutes (1953) 48.01 and 48.02 whether by claiming power over absent indispensable parties through constructive service or by treating an unambiguous will or a foreign *inter vivos* trust as a res,

1. The error referred to in appellees' insidious footnote 2 on page 5 of their motion is completely explained and negated in the record. The Trial Court summarily disposed of appellees' argument on this point (1a) and the Appellate Court ignored it.

attempt to take appellants' property [2] without extending to them the due process guaranteed to them by the Fourteenth Amendment. Appellees have continually throughout these proceedings and in their present motion threatened to surcharge the executrix, since she cannot recover the trust assets in the face of the judgment of the Delaware Courts.[3] The *Liberty Warehouse* and *Smith* decisions of this Court were not concerned with the absence of indispensable parties and are not applicable to this proceeding. See *McArthur v. Scott*, (1885) 113 U. S. 340, 396. We submit that the Supreme Court of Florida must have recognized that in the absence of Wilmington Trust Company and the nonresident beneficiaries, its ruling would be futile, and for that reason it necessarily had to reverse the trial judge on the question of jurisdiction in order to reach its end result.

## 2. The Federal Questions Were Timely and Properly Raised and Expressly Passed Upon.

We again point out that the jurisdiction of the Florida Courts was raised in appellants' first pleading and throughout the proceeding. When ruling on their motion to dismiss was deferred on April 9, 1954, they petitioned the Supreme Court of Florida for certiorari, without success. The Court's jurisdiction was again questioned as a separate defense in their answer and in their motion to stay the action during the pendency of the Delaware proceeding. When this motion was denied on August 25, 1954, they again petitioned the Supreme Court for certiorari, again without

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2. Appellees' motion (p. 3) erroneously charges that "Hanson * * * is the sole appellant." William Donner Roosevelt is also an appellant, and if either of his brothers died without issue, he might share in property in this trust. Why else would appellees join him as a defendant?

3. Appellees charge Mrs. Hanson with using her children to further the Delaware proceedings. The children were represented by Edwin D. Steel, Jr., Esq., a member of the firm of Morris, Steel, Nichols & Arsht, of Wilmington, Delaware, who was appointed guardian ad litem by the Delaware Chancellor (19a).

success. The question was argued before and decided by the Trial Court which held that it had no jurisdiction over the Trustee, the trust res, or the non-resident beneficiaries in its order of January 14, 1955. It was re-argued before the Trial Court in an effort to convince that court that it could not render a final enforceable decree in the absence of indispensable parties and the trust res. It, and the further questions of the Constitutional right to full faith and credit of the judgment of the Delaware Courts, were argued before the Supreme Court on March 27, 1956, and ruled upon by that court in its opinion of September 19, 1956. Finally, the Federal questions raised in this appeal were again presented to the Supreme Court in appellants' petition for rehearing which was denied by order of that Court dated November 28, 1956, which by its terms recites that the petition "has been considered".

**3. The Judgment Appealed From Does Not, as Claimed by Appellees, Rest on an Adequate Non-Federal Basis.**

Appellants have bottomed this appeal on three individually adequate Federal questions.

(a) Lack of due process under the Fourteenth Amendment.

(b) Failure of the Florida Courts to give full faith and credit to the judgment of the Delaware Courts in violation of Article Fourth of the Constitution.

(c) Failure to apply the proper state law in violation of the Fourteenth Amendment.

We submit that if this Court should consider that appellants could not independently raise the question of the Florida court's jurisdiction over absent indispensable parties, then this Court should grant certiorari under the provisions of 28 U. S. C., Sec. 2103.[4]

4. Appellants are advised that a Petition for Certiorari to the Delaware Supreme Court is about to be filed in this Court by the Denckla-Stewart interests.

WHEREFORE, appellants respectfully move that appellees Motion to Dismiss be denied and appellants appeal be granted.

Respectfully submitted,

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